Supreme Court, U.S.
FILED
JUL 14 1999
CLERK

(4)

No. 98-1600

In the Supreme Court of the United States

ROBERT W. "BOBBY" UNSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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APP

QUESTIONS PRESENTED

1. Whether the regulatory offense of operating a snowmobile in a National Forest Wilderness Area, in violation of 16 U.S.C. 551 and 36 C.F.R. 261.16(a), requires proof that the defendant knew he was in such a wilderness area.

2. Whether, assuming that a defense of necessity is permitted for the regulatory offense in this case, the burden of proof for that defense may be placed on the defendant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 165 F.3d 755.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1999. The petition for a writ of certiorari was filed on April 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of Colorado, petitioner was convicted of unlawful operation of a snowmobile within a National Forest Wilderness Area, in violation of 16 U.S.C. 551 and 36 C.F.R. 261.16(a). He was fined

$75.00. Pet. App. 32-34. The court of appeals affirmed. Pet. App. 1-29.

1. On December 20, 1996, petitioner and a friend, Robert Gayton, were operating their snowmobiles in the San Juan Range of the Rocky Mountains near La Manga Pass in southern Colorado. Pet. App. 3. Mr. Gayton was a completely inexperienced snowmobiler, who relied upon petitioner and followed his lead. *Ibid.* The men drove their snowmobiles into a National Forest Wilderness Area, where Mr. Gayton's snowmobile became stuck in a small ravine and had to be abandoned. *Id.* at 3, 13. After Mr. Gayton's snowmobile became stuck, strong winds whipped the snow on the ground into a "ground blizzard" that created a hazardous situation for the men. *Id.* at 4. They sought to find the way back to safety on the remaining snowmobile until it became inoperable. *Ibid.* They continued traveling on foot. By fortune and fortitude, they survived two nights in the wilderness before finding safety in a barn, from which they were rescued. *Ibid.*

2. Petitioner was charged under 16 U.S.C. 551 with violating 36 C.F.R. 261.16(a). Section 551 authorizes the Secretary of Agriculture to promulgate regulations for public forests and national forests "to regulate their occupancy and use" and makes a violation of any such regulation a Class B misdemeanor punishable by imprisonment up to six months and a fine up to $5,000.[1]

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[1] Section 551 provides:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the

See 18 U.S.C. 3571(b)(6), 3581(b)(7). A statute specifically dealing with federal wilderness areas provides that "there shall be * * * no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, [and] no other form of mechanical transport" in wilderness areas. 16 U.S.C. 1133(c). The pertinent regulatory provision, 36 C.F.R. 261.16, provides that "[t]he following are prohibited in a National Forest Wilderness: (a) Possessing or using a motor vehicle, motorboat or motorized equipment except as authorized by Federal Law or regulation."

Petitioner argued that, in order to convict him, the government had to prove not only that he was operating a snowmobile in a National Forest Wilderness, but also that he knew that he was operating it in a National Forest Wilderness. The district court rejected that argument, ruling that "there is no *mens rea* element to the offense." Pet. App. 35; see also *id.* at 41. The district court ruled, however, that it would recognize a defense of necessity, if "there was no legal alternative of which the defendant knew or should have known at the time to violating the law," if "the harm to be prevented was imminent," and if "a direct causal relationship is reasonably anticipated to exist between defendant's actions and avoidance of the harm." *Id.* at 43. The court stated that, because "there is no *mens rea* element to the government's burden of proof * * *, the burden of establishing this [necessity] defense by a

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forests thereon from destruction; and any violation of the provisions of this section * * * or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both.

The maximum fine has been increased to $5,000 by 18 U.S.C. 3571(b)(6).

preponderance of the evidence falls to [petitioner]." *Id.* at 41.

The trial court made detailed findings of fact. Pet. App. 35-44. The court found that Mr. Gayton's snowmobile—the first snowmobile lost—was found "well within the boundary of the wilderness area." Pet. App. 37. The court also found that petitioner had abandoned his own snowmobile, an "Arctic Cat" model, "well within the boundary of the wilderness area," *ibid.*, rejecting petitioner's argument that someone had moved it from the place where he had abandoned it. See also *id.* at 40 ("I conclude that the government has established beyond a reasonable doubt that * * * [petitioner] operated a motor vehicle within the boundaries of the San Juan Wilderness area without authorization by federal law or regulation.").

With respect to petitioner's necessity defense, the court found that petitioner and Gayton entered the wilderness area while they were still engaged in recreational use of their snowmobiles and before the storm arose. Pet. App. 42. The court was "not satisfied that a true emergency arose until [the] time either just before or just after Mr. Gayton's machine got stuck." *Ibid.* Since that machine was abandoned well within the boundaries of the wilderness area, the court stated that it "would * * * find and conclude that [the necessity] defense is not available because the offense charged here was in fact committed before the emergency sufficient to give rise to such a defense occurred." *Id.* at 44. The court added that petitioner himself had been "responsible for placing [him]self in the position of violating the criminal statute." *Ibid.* The court also found that maps giving the precise location of the wilderness area were readily available "all over the place," and that "anybody recreating where there is a wilder-

ness area nearby simply ought to use one of these maps." *Ibid.* The court stated that "[c]learly a use of [such maps] would have prevented this from happening at all." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-29. The court upheld the district court's determination that the regulatory violation was a strict-liability offense. The court first noted that neither 16 U.S.C. 551, the authorizing legislation, nor 36 C.F.R. 261.16, the regulatory prohibition, contains a mens rea requirement. Pet. App. 14-15. Applying the reasoning of *Morissette* v. *United States*, 342 U.S. 246, 255-256 (1952), the court concluded that the regulation described a "public welfare" offense for which strict liability was permissible. Pet. App. 15-18. The court was satisfied that, construed as a strict-liability offense, the regulation imposes a reasonable duty of compliance, the offense is not one derived from a common-law crime, strict liability is supported by the underlying congressional purpose for the regulation, conviction does not impose any significant stigma on the defendant, and the penalty is relatively small. Pet. App. 18-20. The court also observed that similar Forest Service regulations had been held in other cases to proscribe public welfare offenses for which strict liability was the standard. Pet. App. 18, citing *United States* v. *Kent*, 945 F.2d 1441, 1446 (9th Cir. 1991) (unauthorized occupancy of National Forest land); *United States* v. *Larson*, 746 F.2d 455, 456 (8th Cir. 1984) (trespass by cattle); *United States* v. *Wilson*, 438 F.2d 525 (9th Cir. 1971) (cutting wood); *United States* v. *Northwest Pine Products, Inc.*, 914 F. Supp. 404, 407- 408 (D. Or. 1996) (timber operations).

The court also upheld the district court's allocation to petitioner of the burden of proof of his necessity defense. The court recognized that, "when evidence has

been produced of a defense which, if accepted by the trier of fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense." Pet. App. 21-22. But the court also recognized that "[t]he Constitution *permits* allocation of the burden of proof to the defendant with respect to a defense which does not negate an element of the crime." *Id.* at 22. The court stated that the issue of the burden of proof with respect to a necessity defense is not directly addressed by the statutes or regulations at issue. *Id.* at 23. The court noted, however, that "it is the defendant who is most likely to have access to the facts needed to prove [a necessity] defense" and that "[i]t would be impractical * * * to impose on the government the burden of disproving necessity beyond a reasonable doubt." *Id.* at 23. Accordingly, the court held that the district court properly ruled that "[petitioner] had the burden of proving the defense of necessity." *Id.* at 24.

ARGUMENT

1. a. The court of appeals' holding that Section 551 and the Forest Service regulations permit conviction without proof of *mens rea* is correct. In *Morissette* v. *United States*, 342 U.S. 246 (1952), this Court recognized the existence of numerous statutes and administrative regulations defining what have been called "public welfare offenses" that impose strict liability without regard to the intent of the violator:

> Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury

> to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.

342 U.S. at 255-256. Quoting Judge, later Justice, Cardozo, the Court distinguished such regulatory offenses from "infamous crimes," which ordinarily require "[t]he element of conscious wrongdoing, the guilty mind accompanying the guilty act." *Id.* at 257 (quoting from *Tenement House Dep't* v. *McDevitt*, 109 N.E. 88, 90 (N.Y. 1915)). The Court recognized that, for such regulatory offenses, "penalties serve as effective means of regulation" and such an offense "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." 342 U.S. at 259-260, (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 280-281, 284 (1943)).

In *Morissette*, the Court noted that public welfare offenses generally share certain characteristics. First, "[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." 342 U.S. at 256. In addition, "penalties [for such offenses] commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Ibid.*

b. The court of appeals correctly held that operating a motor vehicle in a designated wilderness area is a "public welfare offense" that dispenses with the need to prove *mens rea*, as explained in *Morissette*. Indeed, as the Court noted in *United States* v. *Feola*, 420 U.S. 671, 690 (1975), "[t]raffic violations generally fall into that category of offenses that dispense with a *mens rea* requirement." This offense, like many other motor vehicle offenses, has all the characteristics of a public welfare offense identified in *Morissette*. First, the prohibition merely requires a person operating a motor vehicle near a designated wilderness area to take care to ascertain his location and ensure that it is not within the boundaries of a wilderness area. See Pet. App. 18 ("[T]he duty imposed is reasonable, under the circumstances, and adherence is properly expected."), 44 (noting that "anybody recreating where there is a wilderness area nearby simply ought to use one of these [readily available] maps"). Second, like other motor vehicle offenses, operating a motor vehicle in a designated wilderness area subjects the offender to a penalty (a maximum of six months' imprisonment and a $5,000 fine) that is "relatively small," especially in comparison with the "heavier sentences of imprisonment and fines" that are "common" in today's criminal codes. *Id.* at 19-20. Indeed, petitioner's actual penalty of a $75 fine and no imprisonment, which is apparently common in such cases, see *id.* at 46-47, emphasizes the modest nature of the penalty. Third, as the court of appeals noted, "conviction does not gravely besmirch one's reputation." Pet. App. 18-19.[2]

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[2] Petitioner argues (Pet. 28-29) that "the Tenth Circuit erred in finding that 'conviction [of operating a snowmobile in a wilderness area] does not gravely besmirch' [petitioner's] reputation." The

In addition to the above factors, the court of appeals noted that other factors also support classifying the offense at issue here as a public welfare offense. There is no mention of intent in the statute or regulations. See Pet. App. 14-15. In addition, the offense itself does not employ the terms of, or otherwise derive directly from, any common law crime that itself requires intent, and Congress's purpose to protect wilderness areas from the irreparable damage that can be caused by motor vehicles supports construing the offense as a public welfare offense. See *id.* at 18 ("[T]he statutory scheme is not one taken from the common law and congressional purpose is supportive."); see also *Morissette*, 342 U.S. at 261-262; *Neder* v. *United States*, No. 97-1985 (June 10, 1999), slip op. 19-20.

2. Contrary to petitioner's contention (Pet. 11-17), the court of appeals' conclusion that the offense at issue here does not require proof of *mens rea* does not conflict with any decision of this Court.

a. In *Liparota* v. *United States*, 471 U.S. 419 (1985), the Court interpreted a statute proscribing food-stamp fraud, 7 U.S.C. 2024(b)(1) (1982), which provides that "whoever knowingly uses * * * [food stamps] in any manner not authorized by [law]" was guilty of a felony if the value of the food stamps was $100 or more. The Court held that the express statutory intent

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fact that petitioner's personal fame as a race car driver made his efforts to avoid conviction in this case a subject of news reports, see *id.* at 29 n.14, is of no relevance to the Tenth Circuit's statement that the offense itself does not besmirch the character of the violator in the way that conviction of many much more serious criminal offenses would. In any event, the headlines quoted by petitioner reflect criticism of petitioner's refusal to accept responsibility for his conduct; they do not suggest that the infraction itself reflects poorly on petitioner's character.

requirement ("knowingly") applies not only to the "use" of the food stamps, but also to the element that the use was in a "manner not authorized" by law. 471 U.S. at 423-434. Rejecting the argument that Congress intended to dispense with a *mens rea* requirement, the Court observed that "[i]n most previous instances [of offenses dispensing with *mens rea*], Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Id.* at 433.

The conclusion that the offense at issue in this case does not require proof of *mens rea* is entirely consistent with the Court's decision in *Liparota*. The statute in *Liparota* specified that the offense must be committed "knowingly," and the Court concluded that the use of that term indicated a requirement that the violator know that his use of the food stamps was "in any manner not authorized by [law]." In this case, by contrast, both the statute and the regulation are silent with respect to intent. Moreover, this statute is unlike the statute at issue in *Liparota* in two other critical respects. First, the penalty for the violation in this case (a maximum of six months' imprisonment and a $5,000 fine) is far less than the penalty for food-stamp fraud in *Liparota* (a maximum penalty of five years' imprisonment and a $10,000 fine). Second, motor-vehicle offenses such as the one in this case have long been held to be public-welfare offenses that require no proof of *mens rea*, see *Feola*, 420 U.S. at 690; Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 73, 84 (1933), whereas the food-stamp fraud offense in *Liparota* falls within no such generally accepted category of public welfare offenses.

b. The decision of the court of appeals is also entirely consistent with *Staples* v. *United States*, 511 U.S. 600 (199⁄). In that case, the Court held that a person may not be convicted of possessing an unregistered machinegun, in violation of 26 U.S.C. 5861(d), without proof that he knew that the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. 511 U.S. at 604-619. *Id.* at 616. The Court in *Staples* specifically noted that "[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 616. The firearms statute at issue in *Staples* provides for a maximum penalty of ten years' imprisonment, see *ibid.*, and that penalty strongly supported a requirement of *mens rea*. In this case, by contrast, the maximum term of imprisonment is six months and offenders like petitioner are typically assessed a fine of $75 and no imprisonment.[3] Those penalty provisions point in the opposite direction from the provision in *Staples*, supporting the court of appeals' conclusion that the offense here is a public welfare offense that does not require proof of intent. In addition, as noted above, the motor-vehicle offense at issue in this case, unlike the firearms offense in *Staples*, falls within a well- recognized category of public welfare offenses that dispense with a *mens rea* requirement.

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[3] The misdemeanor penalties authorized by Section 551 are roughly equivalent to the penalties that the Court in *Staples* cited as being consistent with public welfare offenses that dispense with a *mens rea* requirement. See 511 U.S. at 616 (citing *Commonwealth* v. *Raymond*, 97 Mass. 567 (1867) (crime involving a penalty of a "fine up to $200 or six months in jail, or both")).

3. The holding of the court of appeals regarding the elements of the offense for which petitioner was convicted does not conflict with any decision of any other court of appeals.

a. Petitioner contends (Pet. 20-24) that the decision in this case conflicts with the Ninth Circuit's decisions in *United States* v. *Semenza*, 835 F.2d 223 (1987), and *United States* v. *Launder*, 743 F.2d 686 (1984). That contention is mistaken.

In *Semenza*, the defendant was charged under Section 551 with "[p]lacing or allowing unauthorized livestock to enter or be in the National Forest System," in violation of 36 C.F.R. 261.7(a). In *Launder*, the defendant was charged with violating 18 U.S.C. 1856, which provides that "[w]hoever, having kindled * * * a fire in or near [federal land] * * * permits or suffers said fire to burn or spread beyond his control" shall be subject to six months' imprisonment and a fine. In each case, the Ninth Circuit held that the operative terms of the prohibitions ("placing or allowing" in *Semenza*, "permits or suffers" in *Launder*) require "a willful act or a willful failure to act in the face of a clear opportunity to do so." *Semenza*, 835 F.2d at 224; *Launder*, 743 F.2d at 689.

The prohibition at issue here, by contrast, does not contain terms like "allow" or "permit," which may be construed to require proof of willful action. Instead, Section 261.16(a) prohibits "[p]ossessing or using" a snowmobile or other motorized equipment within a wilderness area—terms that do not necessarily connote any mental state other than the voluntariness of

possession or use.[4] The Ninth Circuit itself, in *United States* v. *Kent*, *supra*, held that its holdings in *Semenza* and *Launder* depended on the presence of the particular terms that defined the offenses in those cases. In *Kent*, which involved a prosecution under Section 551 for violating a regulation prohibiting "using National Forest System lands for residential purposes,".36 C.F.R. 261.10(b), the court explained that the language of that regulation, unlike the language of the regulations at issue in *Semenza* and *Launder*, "speaks solely of action, with no reference to volition," and that it would therefore be inappropriate to construe the regulation to require proof of *mens rea*. 945 F.2d at 1446. The same conclusion follows here. See also *United States* v. *Wilson*, 438 F.2d 525 (9th Cir. 1971).

b. Petitioner also contends (Pet. 24-25) that the court of appeals' holding conflicts with the Fourth Circuit's decision in *United States* v. *Wilson*, 133 F.3d 251 (1997). In that case, the Fourth Circuit interpreted a provision of the Clean Water Act, 33 U.S.C. 1319(c)(2)(A), which provides that "[a]ny person who knowingly violates section 1311" commits a felony. The court held that the explicit statutory intent requirement ("knowingly") applied to all elements of the offense and required "defendant's knowledge of facts meeting each essential element of the substantive offense." 133 F.3d at 262 (emphasis omitted). The offense at issue here differs from that in *Wilson* in that the regulation defining the offense here does not use the term "knowingly," the offense itself is a misdemeanor with a relatively short maximum sentence, and

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[4] As noted above, although the felony firearms offense in *Staples* was also a possessory offense, the severe penalties proscribed for violations suggested that proof of *mens rea* was necessary.

the offense falls within a recognized category of offenses (motor vehicle offenses) that require no *mens rea*. The decision of the Tenth Circuit does not conflict with the Fourth Circuit's decision in *Wilson*.[5]

4. Petitioner argues (Pet. 17-20) that it was unconstitutional for the court of appeals to place upon him the burden of proving the defense of necessity that the district court ruled would be available to him. That argument is mistaken.

In *Patterson* v. *New York*, 432 U.S. 197 (1977), this Court held that it does not violate the Due Process Clause to impose on a defendant the burden of persuasion for a defense that does not negate any element of the offense. 432 U.S. at 205-211. Petitioner accepts that proposition, Pet. 18-19, but argues that *Patterson* applies only when the defense is specified by statute and not when it is of judicial creation. Nothing in *Patterson* suggests that the source of the defense is material; the material feature for burden-shifting is that the defense did not negate any element of the offense, which is the case here.

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[5] Petitioner argues (Pet. 25-29) that the court of appeals' decision in this case is inconsistent with the decision in *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960) (Blackmun, J.). In *Holdridge*, defendants were charged with violating a provision of 18 U.S.C. 1382 providing that "[w]hoever reenters or is found within any [federal military installation] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof" is guilty of a misdemeanor. The Eighth Circuit ruled that Section 1382 defines a strict liability offense and it would be inappropriate to infer a *mens rea* requirement that was not expressed in the terms of the statutory provision. 282 F.2d at 308-310. The Tenth Circuit's decision in this case reaches the same result, and it accordingly does not conflict with *Holdridge*.

Petitioner asserts (Pet. 19-20) that the court of appeals' holding that petitioner bears the burden of proving the defense of necessity conflicts with *United States* v. *Talbott*, 78 F.3d 1183 (7th Cir. 1996). In that case, the Seventh Circuit held that, absent express statutory direction, the burden of proof presumptively lies with the government on a defense, even where the Constitution would permit it to be imposed on defendant. 78 F.3d at 1186. *Talbott* involved the burden of proof of the defense of self-defense to the charge of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1).

The rule of statutory construction applied in *Talbott* has been developed and applied only in cases involving serious felonies. See 78 F.3d at 1186 (citing cases). We have found no case, and petitioner has not cited any, applying that rule of construction to defenses to strict-liability public welfare offenses. With respect to such offenses, the court of appeals correctly held that the fact that the defendant "is most likely to have access to the facts needed to prove [a] defense [of necessity]," Pet. App. 23, is a sufficient basis to infer that Congress would not have wanted to place the burden of proof with respect to that defense on the government.[6]

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[6] With respect to the necessity defense, petitioner repeatedly argues (Pet. 6-7, 15-16) that his control of the snowmobile was impaired by extreme weather conditions before he entered the federal wilderness area. The district court, however, made a factual finding, affirmed by the court of appeals, that the difficult weather conditions did not arise until after petitioner had entered the wilderness area, and it rejected petitioner's necessity defense on that basis. See Pet. App. 44 ("the offense charged here was in fact committed before the emergency sufficient to give rise to such a defense occurred").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1999